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JUL 14 1950
CHARLES ELMORE CROPLEY

IN THE

United States Supreme Court

October Term, 1949

No. 455

AUTOMATIC RADIO MANUFACTURING COMPANY, INC.,

Petitioner,

vs.

HAZELTINE RESEARCH, INC.,

Respondent.

PETITION FOR REHEARING.

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Tying-In and Block-Booking.

The majority opinion appears to us to be untenable from a logical standpoint, and impossible from a practical standpoint, on the facts of this record. The difficulty appears to lie in a failure to consider controlling facts.

The Court expressly points out (Opinion, p. 3)

> "there is no conditioning of the license grant upon the acceptance of another and different license."

The grant of a license under one patent on the condition that the licensee take a license and pay royalties under another would of course be an unlawful extension of the patent monopoly by block-booking.

The Court further holds, however, that a patent owner may use one patent **to enforce the payment of royalties** on devices the patent **does not cover**, provided only that he

does not make his licensee sign a license calling for royalties under a patent which does cover the devices. He may therefore enforce the payment of royalties on devices his patent does not cover, provided:

1. The devices are unpatented; or
2. He does not own a patent covering the devices; or
3. He does not force the signing of a license under a patent covering the devices.

The mere statement of these propositions would seem to be their own refutation. Obviously no one will illegally require the signing of a second license calling for royalties under a second patent if he may legally collect the second royalties provided no second license is signed. Thus, he may accomplish deviously the exact result which is barred by the illegal method. A premium is put on subterfuge.

The motion picture distributors may now license the exhibition of only Grade A pictures, but at a rate which includes a full charge for the privilege of using Grade B pictures, whether or not the exhibitor chooses to exercise that privilege.

ASCAP, or a new Association of composers, may now compel the motion picture producers to pay it percentage royalties on all films produced for the next 10 years, whether having music or not, and whether the music originated with ASCAP members or not, and even though none did.

The facts of the present case also strikingly illustrate the inevitable results.

Hazeltine's Neutrodyne patents became obsolete in 1927. Continuously since that time, large companies have re-

fused to pay royalties and Hazeltine has sued and sued again on patent after patent in the attempt to enforce the payment of royalties. For twenty-one years every patent sued on has been held finally invalid, or not infringed, or both (see cases cited on pages 4 and 5 of our Main Brief). Hazeltine has no unexpired patent which has ever been finally held to be valid and infringed despite its repeated suits.

Obviously, in all these years Hazeltine has had no valid patent worth using, and no one for 21 years has paid Hazeltine for the privilege of using anything. This may be because of Hazeltine's parsimonious research appropriation (R. 173(h)).

Nor is anyone today paying Hazeltine royalties for the privilege of using anything, past, present, or future. This is proved, conclusively it seems to us, by the fact that seven large companies, namely (R. 178-9, 249-251):

General Electric
General Motors
Admiral
Philco
Emerson
Crosley
Motorola

do not pay royalties to Hazeltine. They can afford to fight and do. This list includes every large manufacturer in the industry except RCA and Zenith. Hazeltine grants licenses under patents of both of those companies (R. 255).

Yet today, Hazeltine has 130 radio manufacturing licensees. Why?

The answer to that question is found in a single fact of record, namely, that on every infringement suit Hazel-

tine has spent more than $100,000 (R. 189). Small companies obviously cannot afford suits of that magnitude. The minimum royalties of $10,000 a year which Hazeltine demands of Automatic Radio in this action amount to more than 25% of its net profits (R. 178(b)).

One other fact confirms this answer beyond possible question. At the time the license was signed, Mr. Woodworth, Automatic Radio's patent counsel, advised it that it was using no Hazeltine patents but must nevertheless settle with Hazeltine because the cost of litigation would be (R. 202)

> "far beyond the means of defendant, which is a comparatively small corporation."

This affidavit was not made on information and belief.

Hazeltine has 130 licensees only because of the economic pressure it exerts through litigation—not because of the merits of a single one, or all, of its patents.

The signing by 130 small manufacturers of standard, uniform, printed forms of license agreement represents no more bargaining for terms than the purchase of a railroad ticket.

The fallacy in considering this a (Opinion, p. 5)

> "convenient mode of operation designed by the parties" (note use of plural)

is clear from the reason given for so holding, namely (p. 5)

> "to avoid the necessity of determining whether each type of petitioner's product embodies any of the numerous Hazeltine patents."

This mode of operation was clearly not designed by Automatic Radio. It may be safely assumed Hazeltine would accept all royalties paid by any licensee, even though the

licensee chose to pay on its total production without questioning patent coverage. The only inconvenience which the licensee is spared is therefore the burden of determining whether it owes Hazeltine money, if it had the right to make such a study. Such right would clearly not be relinquished as a matter of "sound business judgment". Nor could it possibly represent the (Opinion, p. 6)

> "most convenient method of fixing the business value of the privilege granted by the licensing agreement"

when it is considered that patents run for only 17 years while the license is for at least 10 years (R. 16, Article X, Section 1). The majority of Hazeltine's patents would expire in 10 years, and it has produced nothing patentable in over 20 years (see p. 3 above).

This is certainly not intended to be either incendiary, or vague. It is a recital of conclusions which, it seems to us, inevitably follow from the undisputed facts of record, and inevitably lead to a legal conclusion of misuse of patents.

Hazeltine changed in 1937 to a form of license under which it collected royalties on devices not covered by its patents (Binns, R. 82) only because it no longer had any patents which anyone desired to use (p. 3 above). If the decision of this case is not changed the Hazeltine form will undoubtedly be adopted by many large owners of many trival patents.

From a practical standpoint, the weapon which this decision places in the hands of patent owners, particularly the administrators of patent pools, is of heroic proportions. The opportunities for patent exploitation which it opens up are staggering.

In the *National Lead* case, 332 U. S. 319, this Court, referring to a mere few hundred patents, none of which had

been litigated, quoted at page 327 the last two sentences of the following quotation from Judge RIFKIND's opinion in the District Court in that case at 63 F. Supp. 532:

> "The result of that is that the newcomer is confronted by a veritable jungle of patent claims through which only the very powerful and stout-hearted would venture, having a regard for the large initial investment which this business requires. These patents, through the agreements in which they are enmeshed and the manner in which they have been used, have, in fact, been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired, is today less accessible to free enterprise than when it was first launched."

Patent pools of thousands of patents are common today. One patent pool in the radio industry exceeds 10,000 patents.

By using Hazeltine's new form of patent marking which this Court approves, the administrators of these pools need not inform even their licensees which of their patents it asserts they are using. Patents multiply at such a rate in big industries that even those which issue currently cannot even be studied by the small competitor, who must take a license. The decision in this case, as a practical matter, fastens a perpetual patent monopoly upon many industries, regardless of the merits of any one, or all, of the patents. The public, of course, pays.

If the collection of patent royalties under the combination of 570 patents of at least 7 different owners on the unpatented products of 130 manufacturers is not a restraint of trade, then price fixing is not a restraint of trade.

This Court has said in the case of *Standard Oil Co. v. United States*, 283 U. S. 163, at page 174:

> "If combining patent owners effectively dominate an industry, the power to fix and maintain royalties

is tantamount to the power to fix prices." National Harrow Co. v. Hench (C. C.) 76 F. 667, affirmed in 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, see also (C. C.) 84 Fed. 26; Blount Mfg. Co. v. Yale & T. Mfg. Co. (C. C.) 166 Fed. 555."

Yet the power of combining patent owners to fix and maintain percentage royalties on **unpatented** articles made by 130 manufacturers is expressly approved in this case. Combining patent owners may now legally take their entire profits by dividing percentage royalties on total production (however exorbitant), and compete in price only above this fixed level. In effect, price fixing of unpatented articles is therefore legalized for every industry by following Hazeltine's license form. There is probably no industry in which there are no patents.

Such a holding is a retrogression in the law of patents and monopoly to the period before the Statute of Monopolies of 1623, when the vice of private taxes on ordinary unpatented goods was eradicated.

Restrictive Use.

If Hazeltine has withdrawn the requirement of restrictive use notices on sets, which the record does not show, it has certainly not done so irrevocably. On the contrary, it has done so, if at all, unilaterally and temporarily. The

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Where the royalty demanded is a fixed percentage of the gross sales price, this relationship is clear. A combination of patent-owning manufacturers, which required royalty payments on this basis and which appeared to dominate the automobile bumper industry, was dissolved by a consent decree entered in the district court for Southern New York in December, 1917. See United States v. Discher, unreported, noted in Federal Anti-trust laws and Decisions (Department of Justice) 1928, pp. 147, 148. See also National Economic Conference Board, op. cit. supra note 5, pp. 139, 140. United States v. Discher (D. C.) 255 Fed. 719. * * *"

requirement for the restrictive use notices is still in the license agreement and may be enforced at any time. Furthermore, the original restrictive notice is included in all licenses granted up to the present time, clearly showing that Hazeltine has not abandoned this requirement (Binns affidavit, Respondent's Main Brief, p. 80). Still further, the license itself purports to restrict the uses to which the apparatus may be put by those who purchase it in retail stores. Under the present decision, all the patent owner need do is waive a restriction during the pendency of any litigation in which it is challenged.

Conclusion.

It is accordingly prayed that rehearing be granted.

Respectfully submitted,

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New York, N. Y.,
July 14, 1950.

Certificate.

It is certified that this petition is presented in good faith and not for delay.

FLOYD H. CREWS,
Counsel for Petitioner.